

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JESSICA FOSTER,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:02cv1433(PCD)
	:
MASSACHUSETTS MUTUAL LIFE	:
INSURANCE COMPANY,	:
Defendant.	:

RULING ON MOTION TO DISMISS

Defendant moves pursuant to FED. R. CIV. P. 12(b)(6) to dismiss the complaint. For the reasons set forth herein, the motion is **denied**.

I. BACKGROUND

From March 2000 through December 10, 2001, plaintiff was employed by defendant as a senior systems analyst. In early November 2001, plaintiff became aware of imminent lay-offs. Richard Paige, the department manager responsible for identifying those employees targeted in the lay-off, assured plaintiff that she need not worry about job security. On November 28, 2001, 119 employees were laid-off, with each receiving continued pay for sixty days and an additional two weeks of pay for each year of service. Based on plaintiff's service, this would have amounted to \$45,000.

On November 29, 2001, Jennifer Bates, a department supervisor, asked plaintiff to assist her in cleaning out the cubicle of Richard Backus. Plaintiff was assisted by Russ Taylor, another employee. Taylor found a written performance evaluation of Backus, which included his supervisor's written comments, and showed plaintiff the evaluation. Plaintiff was later approached by Betsy Curtis, another employee, who had Backus's evaluation and invited plaintiff to read it. Plaintiff reviewed the evaluation and comments and then immediately discarded it. She later discussed the evaluation and comments

with Bates. Bates did not provide direction as to how to handle the evaluation and did not notify her that review of the letter might violate company policies.

On December 3, 2001, Tim Allen, a vice-president, interviewed plaintiff in an attempt to ascertain whether she had reviewed the evaluation. Plaintiff admitted that she had reviewed the evaluation and then discarded it, discussing the evaluation only with Bates. On December 6, 2001, plaintiff was suspended pending further investigation. On December 10, 2001, plaintiff was summarily terminated. Her termination was confirmed by a letter from Allen on or about December 12, 2001. The basis for her termination was violation of company rules pertaining to privacy.

When hired, plaintiff was notified that defendant provided a policy manuals, available over the Internet, entitled *People Practices Online Guide for Employees* (“Guide”). Plaintiff was also notified of an employee manual, also available over the Internet. Both contained promises that were accepted and relied on by plaintiff.

After her termination, plaintiff filed the present two-count complaint alleging (1) that defendant breached its employment agreement with her by summarily terminating her and (2) that defendant breached an implied contract that she would not be terminated without just cause and without progressive discipline. Defendant now moves to dismiss the complaint.

II. DISCUSSION

Defendant argues that plaintiff fails to state a claim for breach of either an express or an implied contract as the basis for either claim is the Guide, each page of which expressly disclaims the existence of a contract. Plaintiff responds that the Guide is neither attached to nor incorporated in the complaint,

thus may not be considered, and her claims of breach of an express and an implied contract are otherwise sufficiently plead.

A. Standard

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) is properly granted when “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All allegations are assumed to be true and are considered in a light most favorable to the non-movant. *Manning v. Util. Mut. Ins. Co.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

B. Discussion

Defendant argues that plaintiff incorporated the Guide by reference into her complaint, thus making reference to the same proper. Plaintiff denies such incorporation by reference.

A document may be attached to or incorporated by reference into a complaint, thus making consideration of the document proper in ruling on a motion to dismiss. *See* FED. R. CIV. P. 10(c); *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). The Guide, the specific document at issue in the present motion, is not attached to the complaint, thus the question is whether it is incorporated by reference.

In her complaint, plaintiff quotes several paragraphs from the Guide pertaining to defendant’s progressive discipline policy. *See* Complaint ¶¶ 38-40. It cannot be said that reference to and limited quotation of the Guide constitutes incorporation in its entirety by reference, thus making disclaimers

allegedly contained therein a proper subject for consideration in ruling on a motion to dismiss. *See Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989) (concluding that “limited quotation does not constitute incorporation by reference”). Such would only be appropriate through a motion for summary judgment.

Absent reference to facts outside the pleadings, defendant cannot prevail on its remaining argument that plaintiff fails to allege the existence of an actual agreement and fails to allege an undertaking to contract or promise. Plaintiff responds that she sufficiently alleges an agreement and a promise.

A reasonable reading of the complaint reveals that defendant promised plaintiff through the Guide, at the time she accepted employment, “progressive discipline with respect to attendance, work performance, or behavior,” and defendant breached its promise by terminating her without such progressive discipline. The complaint sufficiently alleges, absent resort to the Guide containing the disclaimer or characterization of her employment as at-will, both an express or an implied employment contract. Without the benefit of additional facts provided by defendant from reference to documents outside the pleadings, *see Coelho v. Posi-Seal Int’l*, 208 Conn. 106, 113-14, 544 A.2d 170 (1988), it cannot be said that plaintiff fails to allege a breach of an express and an implied contract.¹

¹ The above is not to be construed as commentary on the merits of the complaint if the additional information offered by defendant was properly before this Court. It suffices to say that plaintiff alleges in general terms permitted by FED. R. CIV. P. 8 a breach of contract, either express or implied, and the questions of disclaimers and at-will employment are not before this Court.

III. CONCLUSION

Defendant's motion to dismiss (Doc. No. 18) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, April ___, 2003.

Peter C. Dorsey
United States District Judge